2012 WL 6591972 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

CITIMORTGAGE, INC., Plaintiff,

v.

Dorothy WHITE, Defendant and Third Party Plaintiff/Appellant.

v.

KANSAS SECURED TITLE, Third Party Defendant / Appellee.

No. 107895-A.
November 13, 2012.

Appeal from the Shawnee County District Court
The Honorable John Sanders
District Court Case Number 10C1123
Oral Argument Requested 15 Minutes

Brief of Appellant

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NATURE OF THE CASE

The case seeks review and relief from the district court premature summary judgment order. The case seeks review of statutory interpretation of the code of civil procedure, K.S.A. §60-101 *et seq.* and §60-226 for errors relating to a discovery protective order that precluded all discovery based on an erroneous good faith standard without statutory showing prior to premature summary judgment based on K.S.A. §60-225(c) that then determined all claims as to a lack of duty at law between a title company and borrower as well as erroneous application of statute of limitations from 3 years to 1 year which resulted in a denial of all claims including the act of altering a statement in an effort to further the misrepresentation of the actual cost for title company courier fees that were retained as a practice by the settlement agent.

Appellant brings her timely appeal before this Court.

STATEMENT OF ISSUES

ISSUE I: Whether the district court erred in disposing of White's claims against Kansas Secured Title by summary judgment after issuing an order of protection in favor of precluding all of the 7 limited requests for discovery and deposition requested by White during the open discovery period which erroneously denied White any access to discovery to support her claims?

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*2 STATEMENT OF FACTS

On October 3, 2008, Dorothy White entered into a real estate closing with Kansas Secured Title as her settlement agent. Ultimately, the senior citizen living on a fixed income of less than $800 per month total retirement and social security each month was placed with an unaffordable loan rather than a reverse mortgage. (Vol. II, 86-113) A foreclosure petition was filed August 8, 2011 (Vol. I, 15-41). Although a multiparty suit, this appeal only relates to KST and White.

On September 28, 2010, 1 year and 51weeks, less than 2 years after the closing, Dorothy filed her claims against “KST” (Vol. I, P51). KST and CITI answered the claims however BNC filed for a motion to dismiss. That motion was ruled upon August 2, 2011 (Vol. 5, 430-451).

On November 23, 2010 counsel for White wrote KST attempting to resolve issues early confirming a call of November 16, 2010 representing that claims relating to overcharges would be dismissed if the delivery charges were at least $40.00 and the overcharge for the recording fee had been returned. (Appendix B, Vol. V, 428). However, the KST response to the phone offer included the altered UPS invoice which was sent in an effort to represent that KST paid more, $41.66. (Appendix A & C, Vol. V, 427-29)

A case management order was issued on February 11, 2011 which had a discovery completion deadline of August 31, 2011. (Vol. III, 206). White completed her responses to both BNC and KST on March 8, 2011 (Vol. 3, 211) and March 21, 2011 (Vol. IV, 276). White began developing her discovery strategy being more familiar with the facts and began requesting the name of the individual who produced the altered document for deposition. Attempts continued to go unanswered including emails on ***3** April 11, 2011 and May 16, 2011 also without response. (Vol. V, 423) During the next few weeks, counsel stopped by and had a face to face meeting where cooperation was promised. (Vol. V, 423).

On June 9, 2010 yet another email requesting we get together on dates trying to establish either the morning of July 13 or July 14. The following day, June 10, 2010, a return email from KST counsel stated, “I am filing a motion for summary judgment. It might be best to wait until the court rules on the motion before taking depositions.” (*Id.*)

On June 11, 2010, an email was sent noting the failure of cooperation and asking if a motion to compel would be necessary regarding the document and individual who produced the altered document to counsel. (*Id.*) Shortly after, the name of the individual was produced by KST but the actual unaltered invoice was not attached and no dates for deposition were offered. On June 17, counsel for White acknowledged the name and *offered 5 more possible deposition dates.*

June 24, 2010 counsel for White was struck by a cement truck but still contacted KST on July 12, 2010 to try and get cooperation. July 14, 2010 KST wrote back that they did not agree to the deposition. (Vol. V., 424). On July 14, 2010, counsel issued 7 discovery requests and notice was sent for an August 15, 2010 deposition as the deadline for discovery was to be August 31, 2011. (Vol. V. 397). No service of responses nor objections were forthcoming from KST. (Appearance Docket and Table of Contents, Vol. 1, 1-14).

Rather, prior to the outcome of the motion to dismiss by BNC, on July 6, 2011, KST filed for summary judgment attempting to suspend the discovery of the case management order and avoid the noticed deposition. (Vol. V, 362-390).

***4** On July 15, 2011, KST filed a 3 page motion for protective order to be relieved from the total discovery requests of 7 propounded to KST from White. (Vol. V, 397 & 398-400). The total basis for the order was the assertion that, **"It is a complete waste of counsel's time for the parties to engage in additional discovery or schedule depositions until after the pending dispositive motions are decided."** White timely filed opposition to the motion for protective order with attachments on July 29, 2011. (Vol. V, 418-429).

The protective order prohibiting discovery was granted without oral argument and after the letter of counsel to the court stating the motion was ripe for ruling and attaching KST's motion without noting or attaching the opposition to the motion as timely filed by White. The order was signed the same day, November 22, 2011, without any findings of fact. (Vol. V, 454). On December 2, 2011, White promptly filed a motion to reconsider the protective order which remained unheard and was denied as moot by the district court **after** disposing of White's claims by issuance of the summary judgment in the case on February 23, 2012 (Vol. IX, 763).

White filed an affidavit relating to the need for discovery as part of the summary judgment response. (Vol. VI, 467). The district court found, "[Ijn her response, White contests all of KST's arguments." (Vol. IX, P764). On February 23, 2012, the court issued the summary judgment memorandum decision dismissing all of White's claims. (Vol. IX, 763-778) The district court found:

"Some parts of the UPS delivery service invoice appear to be redacted, resulting in uncertainty regarding potentially useful headings." (Vol. IX, 766).

Appellant supplements the statement of facts by presenting additional facts in the arguments and authorities for the purpose of clarity and brevity.

*5 ARGUMENTS AND AUTHORITIES

ISSUE I: Whether the district court erred in disposing of White's claims against Kansas Secured Title by summary judgment after issuing an order of protection in favor of precluding all of the 7 limited requests for discovery and deposition requested by White during the open discovery period which erroneously denied White any access to discovery to support her claims?

Summary judgment is statutorily authorized under K.S.A. 60-256. Interpretation of a statute is a question of law over which this Court has unlimited review. *State v. Maass,* 275 Kan. 328, 330, 64 P.3d 382 (2003).

> K.S.A. 60-256(c)(2) The judgment sought should be rendered if the pleadings, ***the discovery*** and disclosure materials on file, ***and any affidavits*** or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. [Emphasis Added]

Although correct, "[A]n opposing party must come forth with evidence and establish a dispute as to material fact." *Adams v. Sedjwick County Bd. Of Comm'rs,* 289 Kan 577, 584, 214 P.3d 1173 (2009), the proposition does address the issue in this case. Where the district court placed the burden on White committed error entering final disposition by summary judgment failing

to recognize White was in need of discovery and without such, the statute was inapplicable where the statute contemplates the consideration of the discovery on file by specific use of the word. Further where the statute has specific allowance for a party who has not been able to obtain there evidence, such as White.
K.S.A. 60-256(f) When affidavits or declarations are unavailable. If a party opposing the motion shows by affidavit or by declaration pursuant to K.S.A. 53-601, and amendments thereto, that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) Deny the motion;

(2) order a continuance to enable affidavits or declarations to be obtained, depositions to be taken or other discovery to be undertaken; or

(3) issue any other just order.

***6** White presented an affidavit attached to the opposition to summary judgment. (Appendix D, Vol. VI, 495-499). The affidavit detailed the conversation with UPS that led to the belief that the invoice presented was altered and how such was deceptive as applied to the Real Estate Settlement Procedures Act, "RESPA" as a prohibited act (also supported by an amicus brief filed by the Department of Housing and Urban Development asserting the Agency position on 12 U.S.C. 2607, at Vol. VI,) and or Kansas Consumer Protection Act as a deceptive practice where KST misrepresented the cost of the courier fees signing under penalty of perjury. That any further facts were outside the control of White and that discovery and deposition was needed for further support in addition to 13 other numbered paragraphs.

"It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. The Legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the appellate court will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute." *In re Marriage of Killman, 264 Kan. 33, 42-43, 955 P. 2d 1228 (1998).* Also, under our rules of construction, "ordinary words are to be given their ordinary meaning." *Matjasich v. Kansas Dept. of Human Resources, 271 Kan. 246 21 P.3d 985 (2001); Doty v. Frontier Communications, Inc. 272 Kan. 880, 885; 36 P.3d 250; 255 (Kan. App. 2001)*
"It is presumed the legislature understood the meaning of the words it used [*224] and intended to use them; that the legislature used the words in their ordinary and common meaning; and that the legislature intended a different meaning when it used different language in the same connection in different parts of a statute. *Rogers v. Shanahan 221 Kan. 221, 224;565 P.2d 1384, 1389; (1976)* ***7** "Ordinary words are to be given their plain meaning, and courts are not justified in disregarding unambiguous meanings." *Boatright v. Kansas Racing Comm'n, 251 Kan. 240, 245, 834 P.2d 368 (1992)*

"When a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute." *In re Marriage of Killman, 264 Kan. 33, 42-43, 955 P.2d 1228 (1998).*

Clearly the legislature intended for White to be able to have discovery prior to disposition by summary judgment. "Summary judgment is not proper if there remains a genuine issue of a material fact, nor where the opposing party is proceeding with due diligence with his pretrial discovery but has not had an opportunity to complete it." *Timmermeyer v. Brack,* 196 Kan. 481, 412 P.2d 984 (1966).

White had established by affidavit that there was a genuine issue of fact remaining that required discovery and therefore summary judgment was prematurely entered contrary to legislative intent to allow White discovery.

ISSUE II: Whether The Court Applied The Wrong Standard When Granting the Protective Order Under K.S.A. §226 (c).

The issuance and denial of a protective order requires statutory interpretation. Interpretation of a statute is a question of law over which this Court has unlimited review. *State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 (2003).

White had discovery served and was attempting to schedule depositions meeting with resistance from KST which failure to cooperate was then erroneously condoned by the district court when entering a protective order in favor of KST which precluded White's ability to utilize the discovery period further contrary to legislative intent by being denied the deposition of party KST without any showing by the moving party resisting discovery or findings of fact of the district court when summarily granting such without resolution or mention of any of White's legal arguments.

***8** The protective order was granted upon the urging of KST that, **"[I]t is a complete waste of counsel's time for the parties to engage in additional discovery or schedule depositions until after the pending dispositive motions are decided."** The proposition by KST ignores the right of White to discovery under the scheduling order and further ignores the requirements of filing a motion to limit discovery.

> K.S.A. 60-226(c) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense

There was no showing nor attempt to make a showing how KST was unduly burdened or should be relieved from the expense of a deposition. Although it may be embarrassing for a party who holds themselves out as a trusted provider of real estate settlement services and prepares statements with certifications as to the accuracy of the information to have engaged in retaining rather than refunding any overage such is the natural consequence of engaging in the act and the discovery of such can be avoided by refraining from the conduct. More embarrassing may be how or why the document was altered which was a particular inquiry of the deposition where counsel feels strongly that a party presenting such did so in bad faith to avoid claims rather than to resolve issues without expense by providing verification of some mistake and then correcting the same.

If the court desired to protect KST from the exposure of their acts they were required to make findings and could have ordered protection such as deposition under seal, although such would be contrary to public policy. However as it stands neither the motion nor the order statutorily complies with KSA 60-226. K.S.A. 60-226(b)(2) requires specific findings in limiting the discovery

> ***9** (2) *Limitations.* (A) The frequency or extent of use of the discovery methods otherwise permitted under the rules of civil procedure shall be limited by the court ***only if*** it determines that: (i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subsection (c). [Emphasis Added]

The court order states a finding of good faith but such does not meet the statutory showing. The order reads:

"Finally, the Third-Party Defendant, Kansas Secured Title & Abstract Co., has filed a Motion for Protective Order. The Court feels that said party has made a good-faith showing pursuant to K.S.A. 60-226 and the same is hereby granted." (Appendix G, Vol. V, 454-55).

By failing to allow White discovery in issuing the protective order, the court essentially disallowed the claims and erroneously allowed KST to escape liability without any required showing or statutorily required finding.

White also had the right to take the deposition of KST regarding the claims in the case and the presentation of the altered invoice believed created to support the further misrepresentation to mislead and avoid a decision on the merits or inquiry into the issue of the deceptive practice of charging more than double the cost of a represented charge then retaining rather than refunding the charges.

> **K.S.A. 60-230(a)** When a deposition may be taken. (1) Without leave. A party may, by oral questions, depose any person including a party, without leave of court except as provided in subsection (a)(2). The deponent's attendance may be compelled by subpoena under K.S.A. 60-245, and amendments thereto.

***10** White was within her statutory right and had a duty as a litigant to pursue the necessary discovery, here a deposition and 7 requests for production. There is no finding nor assertion that White was not entitled to a deposition for the exception of the "waste of time" to KST's counsel. Such denial of the deposition by order of protection and prior to the issuance of summary judgment was statutory error and should be reversed as contrary to statutory intent for discovery. White was precluded from conducting any discovery by the order of protection from discovery issued in favor of the moving party. (Appendix G, Vol. V, 454). White did not only timely file opposition to the protective order for KST to be fully relieved from any discovery obligations (Vol. V., 418), but also filed a motion for reconsideration that remained both without response by KST and unheard by the district court when issuing the final disposition by summary judgment. (Vol. V, 459)

White further asserts that the presentation of the motion for protective order lacked any statutory authority and further lacked the required certificate of an attempt to confer. K.S.A. 60-237 is applicable and this Court should find such an unsupported motion was a failure to allow discovery and further determine if such should be sanctioned where the motion was designed to mislead the court by asserting that it is permissible to engage in summary judgment prior to producing any of the only 7 requests, allowing inspection of the unaltered invoice, and providing the single deposition particularly where White was the only party to respond to any discovery. **"[I]t is a complete waste of counsel's time for the parties to engage in additional discovery or schedule depositions until after the pending dispositive motions are decided."**

***11** KST knew that the total did not reflect what was being represented or they would not have taken the step to alter the invoice or conceal the copy the represents the actual information. As a matter of fairness it seems if KST wanted to avoid costs they could have provided the information and did not consider the same when propounding extensive discovery, although answered, little seemed relevant to this case and none was used in the motion for summary judgment. White did not bother to object because the costs of the motion practice would have exceeded responding to the irrelevant information. It seems when a party propounds discovery they should expect to answer discovery. November 2010 was when KST could have avoided costs. The letter refers to an offer that White's counsel made to dismiss claims relating to overcharges if the invoices and checks were provided to show there were none. KST has taken every effort to avoid providing the unaltered UPS invoices including presenting a motion to invite error and deny White her statutorily proper discovery prior to summary judgment.

There is support on the record that the motion for protection was presented in bad faith. Certainly providing the documents, without alteration, would have been easier than participating in the motion practice less there is something to hide, the overcharges. The court should also consider the proposition that a party provided documents that misled their attorney to make a statement that, "[t]he bill totals $41.66 but line 1111 of the executed settlement statement reflects only $40.00 was paid

for delivery services...” (Appendix C) When the letter didn't work, and the stalling tactics by failing to respond to schedule depositions were unable to be continued then the motion for protection to essentially quash all discovery was presented.

In actuality, review of the invoice shows the categories have been altered where part of the word ZIP remains which misleads the attorney to read the first column and ***1** miss the rebate or credit where the total was ***only*** $16.92, not the $40.00. (Appendix A, Vol. V, 428) This is a total difference $24.74 from the actual charges. Such may seem minimal but the practice of more than doubling represented costs is deceptive and profitable at the expense of consumers.

The court found that the invoice total for one delivery charge was $7.42 and the other was $9.50 (findings ¶10 and ¶11 in the summary judgment order, Vol. IX, 763). Rather than a “complete waste of time” for KST's counsel to allow discovery for White, it appears clear that by the failure to produce the unaltered invoice and the finding of the court as to the fact the charges were not $40.00 the motion for protective order was an effort to escape liability rather than based on a good faith need. The material issue is not resolved by the finding however it is clear that White was overcharged and the investigation in the affidavit appears that this is a practice that could be yielding a windfall to KST of around $400,000.00 per year estimated at that time and years prior. The Court need not determine why KST would allow the alteration then fail to acknowledge and correct to determine that it was continuing and obvious at some point therefore continuation of the assertion and the motion practice was not in good faith.

> When a party to a case has failed to offer evidence or produce witnesses within his power to produce, an inference arises that the evidence or testimony which would have been produced would have been adverse to that party. *Londerholm v. Unified School District, No. 500,* 430P.2d 188, Kan. 1967.

Certainly providing the documents, without alteration, would have been easier than participating in the motion practice less there is something to hide, the overcharges.

Other fees remain in dispute and need discovery however KST acknowledged in the oral argument that the recording was actually $60.00. (Vol. X, P16, L10) Throughout there was discussion and the court ultimately found that the fee was $8 for the first page ***13** and $4 for each additional page at finding ¶9 of the summary judgment order. There is no question that there is overcharge as the mortgage is attached to the petition at (Vol. 1, 15-41)

The charges and facts relate to the practice of adding a page to recording as a “pad” then retaining rather than refunding the fee is a claim of White's discussed in oral argument at Vol. 10 p 29 and in KCPA claims. (Vol. I, 51-79).

The court erroneously makes the finding adopting the affidavit of Leslie Jo Davis in ¶6 that the “actual charges” were $64.00 and $40.00 for courier. This may be a finding meant to reflect that there was a second settlement statement where the charges to Ms. White were those figures as the court has noted the totals are different and such need not be resolved but is necessary to note to avoid confusion and assure that this Court is aware that the actual charges were significantly less which supports White's claim. Competing affidavits are required to be resolved in the favor of the non-moving party, White.

This type of conduct cannot be condoned in an effort to avoid litigation. If the party took the effort to remove the labels of the column that was intentional and seems to be an effort to hide information or mislead their counsel which is contrary to the administration of justice. Certainly not an act of one who believes they've got nothing to hide or done no wrong.

“Our Court system depends on members of the bar advancing the truth in submissions to the Court; no breach of this professional duty is more detrimental to the administration of justice.” *In re Rumsey,* 276 Kan. 65, 82, 71 P.3d 1150, 1162 (2003)(quoting *In re Wagle,* 275 Kan 63, 76, 60 P.3d 920 (2002)(quoting *In re Roy,* 261 Kan 999, 1004, 933 P.2d 662 [1997])). If a party presents documents with these ***14** alterations and seeks court protection through their attorney inviting such error such should not be ignored. The result is a dangerous landslide away from the rule of law where the rule of money controls. Here where an **elderly** impoverished woman has the rare benefit of legal counsel and then such is met with cost increasing strategies that ultimately denies the poor or consumers from obtaining future counsel for causes that fit into social justice as no practitioner

could afford the unanticipated time in resisting simple limited discovery and reversing invited error therefore should be reversed with instructions and fee shifting.

ISSUE III: Whether the district court erred in finding statute of limitations as the reason for summary judgment when limiting claims on Kansas Consumer Protection Act from 3 years to 1 year as the basis for summary judgment?

Contrary to the district court resolving the issues of fact for summary judgment on the fees or deceptive practices asserted relating to the misrepresentation and retention without refund, the court found that White was outside her statute of limitations on claims.

The Court of Appeals' scope of review of this issue is unlimited. “Interpretation of a statute is a question of law. An appellate court's review of a question of law is unlimited.” *Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, Syl. P 1, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995); Baker v. Gibson, et al., 22 Kan. App. 2d 36; 913 P.2d 1218 (1995)*

The claims arise from the acts on October 3, 2008. The court found this date, the signing of the Mortgage as part of the findings of fact in the summary judgment order. (Appendix E, Vol. IX, 763, VI exhibit 1, the October 3, 2008 HUD-1 at 504-505.)

***15 COUNT X – KCPA**

The court erroneously dismissed Count X, Kansas Consumer Protection Act finding such claims were limited to 1 year by applying K.S.A. 60-514(c). However, the KCPA has a 3 year statute of limitations. *Golden v. Den-Mat Corp.*, 47 Kan. App.2d 450, 276 P.3d 773 (2012). The same court in the same case relating to the remaining parties reversed itself as to the next set of rulings however such was *after* this appeal and therefore an issue for this Court.

The Kansas Consumer Protection Act (KCPA) aims to protect consumers from unscrupulous business practices and, as remedial legislation, should be read liberally to further that objective. The KCPA claims should be reinstated as erroneously dismissed by summary judgment limited to one year when filed 1 year and 51 weeks after the act therefore under the three year statute of limitations.

A jury could find the practice of padding settlement statements then retaining overages as to title fees, the act of misrepresenting the cost of courier fees by entering into a contract that provided volume incentives for selection of service provider then retaining those fees when being charged less than half of the represented costs, and the act of altering an invoice to continue to conceal the overcharge practice is deceptive therefore summary judgment as to KST is premature.

TORTS

The tort claims seems to be disposed by summary judgment due to a duty question which is addressed in *ISSUE IV*, however notable the date by the district court in the summary judgment order for filing against KST by White is listed as October 27, 2010 as the original petition date at page 14 of the Summary Judgment Order. (Vol. IX, 767). The docketing sheet indicates that the date the claims were filed against KST was ***16** September 28, 2010. Although only a month in time, the difference is that the KST claims for torts were first pled prior to the expiration of a standard two year statute of limitations.

TOLLING

The position of White relating to tolling of RESPA claims is that the court did recognize that as a federal statute equitable tolling applies. *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998). Tolling is a matter of fact for the jury as to the issue of whether she knew or should have known and therefore not an issue for summary judgment generally. Under these

facts particularly true where the district court found that for White to be entitled equitable tolling that she must have performed adequate due diligence and that KST fraudulently concealed the information.

The findings of the court were at finding ¶8, she carefully reviewed the settlement statement and to the best of her knowledge and belief it was true and accurate of all receipts or disbursements made on my account or by me on this transaction, after at ¶7 finding that Ms. Davis prepared the statement and explained the charges to Ms. White. Therefore a fact finder may find that White believed the representations and as such performed her diligence by reading, reviewing, and understanding the statement. The lack of action during the year could be evidence that she did actually reasonably rely on the statement rather than stating so but having underlying suspicions. The cases presented relate to other circumstances particularly borrowers not reading for themselves.

Where the court analysis of the case law fails is it is based on the presumption that White should have suspicions, but she had none because of the fact she trusted the title company and relied on the statements. It was the act of concealment and expression of ***17** an affirmative intent for the signor, White, to rely on the statements when the closer represents:

SETTLEMENT AGENT CERTIFICATION

The HUD-1 Settlement statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement.

The same is signed by Leslie Jo Davis with the title “Settlement Agent”

Followed by a warning of crimes relating to false statements.

(Appendix E, Vol. VI, 508 page 3 of the settlement statement (HUD-1))

The court noted equitable tolling is a procedure to balance fairness of a statute of limitations. That is the case here where because of the concealment and misrepresentation the party had no reason to question the transaction however, the misconduct is by engaging in then concealing on the settlement statement, not an additional act after the settlement statement. Here there was an additional act and that is recognized as **“any alleged misconduct of KST did not occur until after the one year statute of limitations”** That conduct was a furtherance of the concealment.

Notably, recognizing the misconduct which was then on notice and pled to the court, how does KST fairly escape all liability for an act committed during the pendency of the case in an effort to be dismissed or avoid liability. Such, which is recognized by the court as alleged misconduct is enough for White to survive summary judgment under the proper standard as resolving issues in favor of the non-moving party, White.

The district court stressed that White had failed to plead that she “reasonably” relied however the reasonableness of the reliance as to a settlement agent making affirmative representations signed under penalty of perjury should be inferred at this stage. A deposition or other discovery would leave KST hard pressed to assert it is unreasonable to rely on their representations.

***18** This issue on summary judgment relating to RESPA in light of the other statutes of limitations being clear is not imperative as White has the means to find relief under the KCPA however the court may address that summary judgment was premature as the pleading could have been amended after discovery of the remaining facts to comport with the evidence. Particularly true with a lack of discovery and the standard that all reasonable inferences are to be resolved in favor of the non-moving party, White.

White urges the Court to set aside the dismissal of the RESPA claim based on the premature summary judgment under the theory that there is no absence of fact that has been shown to preclude the cause of action and therefore after development of the case pleading standards for determination on the merits may be met by White when she has access to all facts.

The remaining issue is a finding either direct within each or implied that KST as a settlement agent had no duty as to White.

ISSUE IV: Whether the district court erred in finding that closing and settlement agents have no duty?

The district court found that White had no contract with KST in dismissing Count 1 Breach of Contract and Count 2 for Breach of the Duty of Good Faith and Fair Dealing for lack of a contract, but then found a contract and found that they performed their contractual duty however the facts are in dispute and summary judgment is premature as to the issue. The court did find that even if an agreement is "unwise" or "disadvantageous" it is still a contract so long as it is not unconscionable. However there is no determination if it is unconscionable to make false representations as a settlement agent. This issue is still open under KCPA allegations, therefore any summary judgment would be premature.

***19** It is not understood what the written contract is that the court references as attached, but the settlement statement is mere evidence of the agreement to enter into and pay for services by preparation of the settlement statement and White's payment of the $250.00 fee to KST that there was an agreement but the terms must be found to be implied from conduct and reasonable expectations as there is no written contract for services.

At page 5 of the summary judgment order, the court found KST did not breach any contract between White and itself as White agreed to pay the $40.00 and $64.00 but failed to recognize the signature reflects White agreed to pay her charges as an accurate accounting therefore KST breached the agreement to provide and disburse the accurate accounting when it was represented that the figures were the total for the services, however there was no disclosure that KST was retaining the overcharges rather than refunding them as they were not disbursed in accordance with the statement. Such goes into the breach of the implied duty of good faith and fair dealing.

The court finds that White fails due to the fact the court already dismissed the breach of contract, yet the pleading should be read as a whole and a savings clause appears in count 1 combining and incorporating by reference count 2. Therefore the court finds it does not need to make a determination as the "requisite element" of a contract is deemed unmet. The court should interpret the pleadings to give substantial justice particularly where no discovery had been obtained at the time of dismissal.

The court ignored that by retaining and failing to disclose unearned fees the implied terms of the contract was frustrated by the acts of KST. White should be allowed to develop the theories then if warranted, move the court for amendment to comport to the evidence as is the normal course of litigation. This portion of the brief is ***20** difficult without discovery but touched upon to avoid waiver although White presents to this Court that the failure in allowance of discovery addressed at Issue I and II saves all noticed claims for development as to the summary judgment but proceeds in an abundance of caution to protect the claims.

Count III, Fiduciary Duty

The court erroneously asserts that if a lender adversary has no fiduciary duty then White's settlement agent has none. However the expectations and purpose of each, lender and settlement agent, is dramatically different particularly where a settlement agent is paid for the distinct purpose of accounting for the money in the real estate transaction, not some but *all* funds.

Further even in lender relationships fiduciary duties can be found because it is dependent on the facts of each case therefore the absence of duty as not a Kansas legal issue for summary judgment.

As recently as July 29, 2011 the Kansas courts held that a lender breached their fiduciary duty to a customer in loan transactions. *Bank of Am., N.A. v. Narula,* 46 Kan. App. 2d 142, 261 P.3d 898 (2011) The existence of a fiduciary relationship, as would support a claim of breach of fiduciary duty, is a question of fact, citing In re Estate of Farr, 274 Kan. 51, 72,49 P.3d 415 (2002); *Dugan v. First Nat'l Bank in Wichita,* 227 Kan. 201, 208, 606 P.2d 1009 (1980).

"The trial court concluded that Bank of America had an implied, not a contractual, fiduciary duty to the Narulas. A fiduciary duty may be "implied in law due to the facts surrounding the involved transaction and the relationship of the parties to each other and to the transaction." *Linden Place v. Stanley Bank,* 38 Kan.App.2d 504, Syl. ¶ 4, 167 P.3d 374 (2007). The question is whether a "special confidence is placed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one placing the confidence." 38 Kan.App.2d 504, 167 P.3d 374, Syl. § 3." *Bank of Am., N.A. v. Narula*, at 30.

***21** Questions of fact need to be weighed and are left for a jury, and not properly a subject for summary judgment. KST cannot support that they are entitled to judgment as a matter of law relating to their fiduciary capacity to White. Surely White was entitled to a special confidence in the representations of the paid settlement agent undertaking for the accounting of her money in the real estate transaction. A reasonable jury could return a verdict in favor of White.

The court found 3 elements would need to appear to find the breach of fiduciary duty. First, the court would have to find the duty. As a settlement agent is in a particular position of trust to account and a neutral who is an agent a fiduciary duty would apply and a finder of fact, could so find. Here there is a special confidence and trust put in the settlement agent to accurately account for the money with a signed certification that the money was disbursed as detailed yet when money remained as unneeded, rather than return money KST overcharged White by retaining money, element 2. The invoice to UPS and the recording fee being less go to the overcharge therefore when retaining rather than disbursing or refunding the money a breach occurred. This concept is similar to trust accounting where a special confidence and expectation is reasonably placed on those handling money for the purposes of another without their own interest.

Such breach of trust and self dealing by the agent and the failure to account for funds goes to the remaining duty issues of KST.

Negligence Count VI

The court dismisses negligence by agreeing with KST that there is no "special duty" yet does not give any consideration to the fact that KST is an "agent" and that agency creates duties. Other duties arise by undertaking as well as the common law duty of care.

***22** An agent is one who is expected to be relied on. Ignoring the fact the settlement agent has agent in the name escapes the descriptive intent of the acts of the individual for White. **The agent has a duty.**

The court errors in reasoning when stating that it stands to reason that if a lender borrower relationship created no special duty then a closing company borrower relationship also does not create a special duty. The court confuses the character and purpose of the relationships. Where with the settlement agent a borrower has hired an independent party for the purpose of accounting for funds and they are a neutral party unlike a lender who has been recognized to be in an adversarial bargaining position with a borrower. The fact is that retaining undisclosed, unearned, or undistributed fees is self dealing and a breach of duty. Here the overcharges are apparent as to the courier invoice and the recording fees where KST retained the extra $4.00 recording and also did not distribute, but actually altered an invoice to appear to have paid more than $40.00 for courier charges that the court found were $7.42 and $9.50, enough that a jury could find self dealing or a breach of duty therefore summary judgment is premature.

Further the court errs in stating that no tort action can be had when this case arises from a contract imputing an agreement that White has not made. "A plaintiff may advance multiple theories of liability based either on a unitary course of conduct by a defendant or on a single legal injury...the plaintiff may pick and choose at his or her discretion so long as the defendant has been fairly apprised of the circumstances." *Golden v. Den-Mat Corp.*, 47 Kan. App.2d 450, 276 P.3d 773 (2012)

***23** It is a long stretch to imagine that the only causes of action in tort arise from claims where the defendant has gratuitously provided their services. All business relationships are expected to have a bargain and a cost. Here White is not claiming some efficient breach of a particular clause in a written contract that did not cause damages, but rather suffered a demonstrated injury

on the overcharges. The analysis is overreaching and avoids tort prematurely dismissing without discovery where a tort action may be properly pled. To adopt such proposition escapes any liability for any professional or business to be liable in tort to a customer. Such escapes reason and is contrary to Kansas law.

The legal conclusion that a tort claim between a borrower and a title company is not valid is erroneous. Further, this dangerously provides a permit for a title company particularly to engage in any practice as they would have immunity from tort. This proposition is far from the intent of the legislature of the Kansas courts.

Count VII, Fraud

The original petition had multiparty issues with joint and several liabilities between multiple parties and it was yet to be determined if KST provided figures or was acting at the direction of another party. There was no original pleading for fraud against KST standing alone at the time of pleading although the November 2010 act of altering the invoice and making the representation that the total courier charges were over $41.66 to avoid the court inquiry may arise to such. The letter of November 18, 2010 makes the following representation to which the altered invoice was attached.

***24 "Please note that the bill totals $41.66, but line 1111 of the executed Settlement Statement reflects that only $40.00 was paid for delivery services from the Borrower's Funds at Settlement."**

This letter is element 1, a false or untrue fact. The court already found that the total of the bills were $7.42 and $9.50 therefore the total ***was not $41.66.***

Element 2, that the statement was known to be untrue or false can be shown by discovery, which was precluded by the protective order denying inspection and the request for the unaltered original, when comparing the altered invoice with the unaltered invoice.

Element 3 is that the letter containing the representation was made to induce White to act and dismiss claims from the suit based on the intended reliance of the altered invoice which can be reasonably inferred by the attachment of the document and further statement, "I believe I have now provided documents showing that Kansas Secured did not overcharge Ms. White for courier and recording." Followed by the urging for White to take action and dismiss claims.

Element 3 continued that KST presents the invoice to the court to have urge the judge to dismiss. The court reasonably relies and White loses her claims to her detriment therefore damaged.

Argument would need to be presented if the fraud is discovered but this does not at this point warrant dismissal of the claim when no discovery has been forthcoming upon premature dismissal when White would have time to amend and comport to the evidence. KST was on notice that White complained of overcharges and this act if not fraud then is deceptive under the KCPA but is an act that should not escape the attention of the court as it encourages the same type of deception to ***5** occur in court proceedings where there is an expectancy such will not be tolerated.

To dismiss Whites claims against KST in total prior to discovery is statutorily premature and encourages bad faith from litigants to utilize discovery avoidance and increase litigation cost and time to avoid liability rather than participate in an equitable weighing of the facts.

The district court was required to resolve the issue in favor of White as the non-moving party. The court hearing the motion is required to resolve all facts and inferences which may be reasonably drawn from the evidence in favor of the non-moving party. *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009). At this point, with the limited findings that the totals are lower and therefore that White was overcharged, it cannot be said that a jury could not find for White.

Nor can it be said that KST met their burden in establishing a lack of evidence exists as to warrant a summary judgment decision. A party seeking summary judgment has the obligation to show, based on appropriate evidentiary materials, there are no disputed issues of material fact and judgment may, therefore, be entered in its favor as a matter of law. In essence, the movant argues there is nothing for a jury or a trial judge sitting as factfinder to decide that would make any difference. In addressing a request for summary judgment, the trial court must view the evidence most favorably to the party opposing the motion and give that party the benefit of every reasonable inference that might be drawn from the evidentiary record. An appellate court applies the same standards in reviewing the entry of summary judgment. Because entry of summary judgment amounts to a question of law - it entails the application of legal principles to uncontroverted facts - an appellate court owes no deference to the decision to grant the motion. *Golden v. Den-Mat Corp.*, 47 Kan. App.2d 450, 276 P.3d 773 (2012)

***26** Here as to duty there is plenty for the fact finder to determine and therefore summary judgment is premature as a matter of law as to the issues of no duty.

ISSUE V: Whether the district limited access to justice or erred when mandating mediation without consideration to Ms. White's inability to pay as an elderly person on a fixed income well under the poverty level living on less than $800 per month

Where the court ordered mediation on November 18, 2010 at the status conference, then again brought it up at the January 2010 conference and required the same prior to the discovery the procedure seems premature. However, White was willing to participate in good faith and comply. On the conference day, due to the funds issue of Ms. White being **elderly** and in a financial hardship Judge Henricks was kind enough to agree with the attorneys to do a free mediation but due to other attorney schedule representing a corporation that was not available.

Therefore a statutory motion to shift alternative dispute resolution fees to the three corporations and away from **elderly** White was filed with affidavit on November 30, 2011. (Vol. V, 456). Such met the statutory requirement but was denied on February 6, 2012 (Vol. VIII, 739). The burden on White is extreme as opposing counsel stated on the record that mediation runs between $2000 and $3500. (Vol. X, P. 12 L4-15) For White to pay her share leaves her with no ability to either pursue her claims due to lack of funds, or since her income is under $800.00 per month without some necessity. As counsel for White and providing services as assistance and in hopes of prevailing on meritorious claims with the legislative intent of fee recovery for such work of social impact, counsel then becomes more burdened with not just time at risk but costs out of pocket prior to ability to be compensated.

***27** The denial of the fee did not consider or address the factors in the affidavit and failure to shift fees under the facts strikes contrary to the interest of justice, results in deterrence or inability for providing future indigent services, and also provides a hardship where without discovery such may be premature.

The White is entitled to a liberal interpretation of the civil procedure statutes. Pursuant K.S.A. §60-102, “The administration of the provisions of the act shall be liberally construed and administered to secure the just, speedy and inexpensive determination of every action or proceeding.” K.S.A. §60-216 controls the management of the case. Generally case management is designed to expedite processing and disposition of litigation pursuant.

Counsel provides no argument about the value of mediation and complains not of attempts of court to encourage resolution prior to a trial however, as we are at appeal hopefully anticipating remand by good faith and belief the same is warranted under the facts and the law, White seeks relief under an **abuse** of discretion standard or statutory error noting the relatively low impact on the corporate litigants as compared to an **elderly** woman on a fixed income.

Therefore to promote the interest of justice and meet the needs of the underserved, White seeks reversal of the denial of the motion to shift fees or minimally suspend such until discovery can be had as the respective issues of the parties is clear and an

agreement as to the averments of White as to the conduct of KST has not been met with a conciliatory attitude nor is it likely without adjudication any fair value for services.

CONCLUSION

"Rules of procedure are a means of justice and not an end to justice. In final analysis, a court has a responsibility to do justice between man and man."

***28** Where KST has increased the costs and time for the case in securing an escape of determination of liability and avoidance of evaluation of the deceptive conduct, justice has not been done. This court should protect the consumer by applying the intent of the legislature in deterring such behavior as to consumers, particularly the **elderly**. Such cases are rare and have social value beyond this consumer. The inability to secure such a result deters practitioners from serving the underserved, most needy, and vulnerable portion of the population.

White has made a case for deceptive practices and the continued conduct of KST tend to prove the merit of those averments. KST should not benefit by increasing the cost of litigation to the point justice is unreachable by White.

KST indicates a dismissive attitude towards their conduct when stating, "The Court kind of hit it on the head when he said $25.00. I do have $25.00 with me today, and if that's what it takes to get this thing taken care of I could probably - probably". (Vol. X,P 72 L23- P73 L2)

The case is not about $25.00, the case is about deception. The question becomes if cases are to be dismissed on a threshold level or minimized conducts because of some amount that appears to have little impact then the legislature would have instructed as such or should say so.

Children should feel free to take candybars if corporations charged with safekeeping and accounting for funds in a transaction can slide a few dollars here and there. It is the act, and what the act represents, not just the amount of on the scale that creates the deceptive practice. Understanding this is not a class action it has wide social impact and is profitable enough to design then justify.

***29** At a time the real estate industry is so in flux with commentary that seems to indicate the corporation misses the point and doesn't get that the conduct is wrong and then displays continuing conduct in altering documents to mislead in efforts to avoid the eyes of the court, it seems that allowing this summary judgment to stand would be dangerous.

White is over 80 years old and believes this court cares not about her color, her age, or that she's poor and properly believes that justice is fair when attorneys and housing resource assistance worked together for a solution then had her counsel stand up for her. She is one of so many but comes to this Court to be heard and trusts this Court to send the message to KST that wrong is wrong.

PRAYER FOR RELIEF

White respectfully requests this Court to find that the district court erred in disposing of White's claims against KST by premature summary judgment by issuance of a protective order that was statutorily deficient by erroneously applying a good faith standard rather than findings as required by the statute. That the seven requests and one deposition requested was not unduly burdensome and that KST failed in making a showing and that the motion failed to comply with KSA 60-237, therefore, that White is entitled to discovery. As such that the summary judgment be reversed and remanded with instructions.

Further that the district court erred when finding KCPA had a one year rather than a three year statute of limitations. That the filing of the claims was under the two year statute of limitations and that other statutes of limitations may be tolled depending on the facts of the case after discovery and any possible amendment of the pleadings to comport thereto.

***30** Further White requests a finding that settlement agents do have a duty of care and accounting further act for another in a special relationship of confidence when trusted to itemize, account, and disburse the borrowers money as certified by the borrowers paid agent therefore such a relationship is one of special trust and confidence of a fiduciary.

Finally that upon remand the Court shift fees to the corporate party based on a showing of hardship and relieve White of mediation until discovery is complete. And, for any additional relief this Court finds just and equitable.

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